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## RESTITUTION AS A BRIDGE OVER TROUBLED CONTRACTUAL WATERS

Mark P. Gergen\*

This essay examines the role that the law of restitution plays in regulating behavior in contract disputes. Part I makes several doctrinal and policy arguments for a rule that gives a person a right to restitution when he renders performance not due under a contract, provided he renders the performance believing that it might be due to avoid a loss. Part II advocates abolishing the general right to elect restitution as an alternative remedy for breach of contract. The rule proposed in Part I would cover many cases decided under the traditional rule, including *Boomer v. Muir*,<sup>1</sup> a case often cited as an example of the perversity of the traditional rule.

I offer this essay as a small tribute to Professor Joseph Perillo. Professor Perillo's kind of scholarship is undervalued in American law schools these days. His approach might be called pragmatic conceptualism, for his work attends to the conceptual apparatus of the law while being pragmatic in understanding the frailties of concepts (as well as the frailties of institutions and of people) and in appreciating that the law serves plural values. Eric Posner recently wrote that "[t]his kind of doctrinalism is useful . . . but a return to this scholarship would have to count as a defeat for the descriptive and normative aspirations of modern legal theory."<sup>2</sup> For scholarship to be useful is quite an accomplishment, but Posner underestimates the goal of what he calls "narrow . . . doctrinalism."<sup>3</sup> The goal is not, as Posner says, "to support the outcome in a given case."<sup>4</sup> That usually is easy to do. The aspiration—and it is just that—is to give a coherent, consistent, and clear account of a mass of decisions. This is difficult

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\* I thank Hans Baade, Andrew Kull, Douglas Laycock, and Alan Rau for their insights and comments. This essay grew out of a paper entitled "Exit and Loyalty in Contract," which was presented at the International Conference on Comparative Remedies for Breach of Contract at Tel Aviv University (June 2002).

1. 24 P.2d 570 (Cal. Dist. Ct. App. 1933).

2. Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure*, John M. Olin Law & Economics Working Paper No. 146 (2d Series), Mar. 2002, at 44, at <http://www.law.uchicago.edu/lawecon/index.html>. This is a passing remark in an intelligent autopsy of economic analysis of contract law. If Posner's style was more poetic this might be called an elegy for the contract branch of law and economics.

3. *Id.*

4. *Id.*

enough to do in a unitary legal system with a small, homogeneous legal elite, such as England once was, or as Rome was in Gaius's time. It is all the more difficult to achieve, but all the more important to try, in our sprawling legal system. Professor Perillo has done this type of scholarship as well as any contracts scholar of his generation.

One of Professor Perillo's particular contributions has been to clarify the role that the law of restitution plays in a contractual setting. His 1973 article shows that when a restitution claim is brought for breach of contract, or when a contract runs afoul of the statute of frauds or the doctrine of indefiniteness, a plaintiff will recover the cost of his performance even though the defendant's benefit is less.<sup>5</sup> In other words, restitution serves a compensatory goal in these settings.<sup>6</sup> Professor Perillo makes the larger claim in the 1973 article and in a 1981 article that restitution serves the goals or policies of contract law when it is used in a contractual setting.<sup>7</sup> He mentions *Boomer v. Muir*

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5. Joseph M. Perillo, *Restitution in a Contractual Context*, 73 Colum. L. Rev. 1208 (1973).

6. This may seem little more than an interesting bit of doctrinal history to a generation accustomed to the Restatement (Second) of Contracts, which says that restitution is enrichment-based and substitutes explicitly reliance-based theories of recovery. Restatement (Second) of Contracts §§ 344(2), 349, 370. In a 1981 article on the Second Restatement, Professor Perillo said that these changes combined "outworn dogma with audacious innovation." Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 Colum. L. Rev. 37, 37 (1981). He was cautiously optimistic about the innovation at the time. But a number of states have not embraced reliance-based recovery when a contract is unenforceable under the statute of frauds. The possibility of reliance-based recovery in restitution remains important in these states.

Professor Perillo's 1973 article does not explore an important subsidiary question. He focuses on cases where restitution is used to recover on unkept informal promises. Restitution, however, also is available when a contract is vitiated by unexpected circumstances. And, sometimes, a party is able to recover in restitution for pre-contractual expenditures when a contract falls through. Does restitution serve a compensatory function in these settings, as well, or is the goal to prevent the defendant from being unexpectedly enriched at the plaintiff's expense? I think the answer is the latter because in these situations we do not consider the defendant to be at fault.

*Allen v. Dunston*, 958 P.2d 1150 (Idaho 1998), raises, but does not resolve, this question. The plaintiffs built a water well on land on which the defendant had a life estate, after she indicated she would give them an easement but before the deal was finalized with the defendant and the owner of the remainder. *Id.* at 1151. The court held that there was no contract because there was "no meeting of the minds," but remanded the restitution claim. *Id.* at 1152. On remand, the defendant should analogize the claim to the case of mistaken improvement while the plaintiffs should analogize their claim to the case of a contract vitiated by informality. If the case is analogized to a mistaken improvement, then the plaintiffs recover nothing if there is significant doubt about the value of the water well to the defendant. If the case is analogized to a contract vitiated by informality, then the plaintiffs may recover the cost of the well though this exceeds the value to the defendant.

7. Professor Perillo does not dwell on the strongest case for his general claim. This is where the defaulting party recovers the value of his part performance in restitution. Most students learn this through *Britton v. Turner*, 6 N.H. 481 (1834). This result is entirely consistent with the expectation and mitigation principles.

as an exception to this general claim.<sup>8</sup> By showing that *Boomer* is not an exception, I reinforce Professor Perillo's general claim, which I think is right on the money.

## I. A RIGHT TO RESTITUTION FOR PERFORMANCE RENDERED IN A DISPUTE

### A. *The Cases*

*Boomer v. Muir*<sup>9</sup> has been called the "classic example" of how a plaintiff can use the optional restitution remedy on a breach of contract claim to reverse a bad bargain.<sup>10</sup> *Boomer* was hired to build a storage dam as part of a large hydroelectric project managed by Storrie & Co.<sup>11</sup> *Boomer* abandoned work on the storage dam although it was near completion, claiming that Storrie had breached the contract in a number of ways.<sup>12</sup> Storrie denied any fault.<sup>13</sup> When he stopped work, *Boomer* had been paid all but \$20,000 of the contract price of approximately \$330,000.<sup>14</sup> *Boomer's* costs were much higher, almost \$600,000.<sup>15</sup> The court, finding that Storrie had materially breached the contract, awarded *Boomer* its unrecovered costs in restitution.<sup>16</sup>

*Boomer* has attracted a fair amount of attention from scholars, much of it critical of the decision. Some commentators have strained to justify the result.<sup>17</sup> But others have noted that there is a simple explanation for the decision. George Cohen calls *Boomer* the "classic example" of "the easiest case to explain" because Storrie's breach was responsible for the cost overrun.<sup>18</sup> Cohen's argument comes straight

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8. Perillo, *supra* note 6, at 44.

9. 24 P.2d 570 (Cal. Dist. Ct. App. 1933).

10. Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 Iowa L. Rev. 797, 809 n.57 (1988). For similar accounts of *Boomer*, see Douglas Laycock, *Modern American Remedies: Cases and Materials* 648-51 (2002); Andrew Skelton, *Restitution and Contract* 1 n.3 (1998); Andrew Kull, *Restitution as a Remedy for Breach*, 67 S. Cal. L. Rev. 1465, 1471 (1994); Perillo, *supra* note 6, at 44.

11. *Boomer*, 24 P.2d at 571.

12. *Id.* at 572.

13. *Id.* at 572-74.

14. *Id.* at 572, 578.

15. *Id.* at 572.

16. *Id.* at 579-80.

17. Wendy J. Gordon & Tamar Frankel, *Enforcing Coasean Bribes for Non-Price Benefits: A New Role for Restitution*, 67 S. Cal. L. Rev. 1519 (1994) (commenting on Kull's article and arguing that *Boomer* may have continued to perform even though its costs were higher than expected because it expected intangible benefits from the contract).

18. George M. Cohen, *The Fault Lines in Contract Damages*, 80 Va. L. Rev. 1225, 1304 (1994). Eric G. Andersen, *The Restoration Interest and Damages for Breach of Contract*, 53 Md. L. Rev. 1, 22-26 (1994), makes a similar argument for sometimes allowing a contractor to recover more than the contract price. See also Thomas C. Galligan, Jr., *Extra Work in Construction Cases: Restitution, Relationship, and*

from the opinion where it was offered as an alternative basis for the decision:

The jury might well have found that Boomer's cost of operation had been substantially increased by Storrie & Co.'s continuing breaches. There is substantial evidence that Boomer suffered delays and increased costs by Storrie & Co.'s failure to deliver materials to the job as rapidly as required. There is evidence that Boomer's costs were considerably increased by failure of Storrie & Co. to excavate the cut-off trench as rapidly as should have been done. There is evidence that the diversion of air from the compressors to other portions of the work and the delay in restoring the burned air compressors hampered Boomer and increased his costs.<sup>19</sup>

*Boomer* is not unusual in this respect. In a fair number of cases in which a plaintiff elects restitution on breach to recover costs in excess of the contract price, the cost overruns are attributable to the defendant's breach of contract.<sup>20</sup> There also are a fair number of counterexamples of cases in which the award to the plaintiff of costs above the contract price seems to give the plaintiff a windfall.<sup>21</sup> My

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*Revision*, 63 Tul. L. Rev. 799, 831-34 (1989), who discusses a related line of contractor hindrance cases and situates them alongside cases involving cost overruns due to change orders, unexpected circumstances, and other causes.

19. *Boomer*, 24 P.2d at 578.

20. Another prominent case, *Philadelphia v. Tripple*, 79 A. 703 (Pa. 1911), is similar. Dietrich employed McMenemy to excavate, lay pipe, and perform other work for conduits from the Delaware River to a pumping station. *Id.* at 704. Because of a defect in the construction of the pumping station, the conduit had to be driven deeper than expected and McMenemy had problems with flooding. *Id.* The conduit had to be redirected and McMenemy continued to work as he fell further behind schedule. *Id.* Eventually Dietrich became impatient and ordered McMenemy off the job. *Id.* at 704-05. Similar cases include: *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 964-65 (5th Cir. 1998) (allowing quantum meruit damages, despite the lack of damages for delay clause where contractor actively interfered with subcontractor); *United States ex rel. Citizens National Bank v. Stringfellow*, 414 F.2d 696, 698 (5th Cir. 1969) (allowing over double contract price for moving dirt because defendant's interference significantly increased plaintiff's cost); *Acme Process Equipment Co. v. United States*, 347 F.2d 509 (Ct. Cl. 1965), rev'd on other grounds, 385 U.S. 138 (1966) (attributing cost overruns to government and third parties although the decision denies recovery for unreasonable costs or for costs attributable to government where plaintiff bore the risks of those costs under a separate contract); *W.F. Magann Corp. v. Diamond Manufacturing Co.*, 580 F. Supp. 1299 (D.S.C. 1984) (citing unanticipated site conditions, defective specifications, and changed conditions as contributing to costs); *Stark v. Magnuson*, 2 N.W.2d 814 (Minn. 1942) (awarding damages to tenant farmer who was promised one-half of proceeds from sale of cattle he tended, where defendant unjustifiably refused to sell the cattle when the market was favorable); *Robinson v. Powers*, 777 S.W.2d 675 (Mo. Ct. App. 1989) (holding that contractor incorrectly marked boundary and elevation, making extra work necessary); *Farrell Heating, Plumbing, Air Conditioning Contractors, Inc. v. Facilities Development & Improvement Corp.*, 414 N.Y.S.2d 767 (1979) (holding that failure to remove mental patients from work area interfered with contractor's work).

21. *United States ex rel. C.J.C., Inc. v. W. States Mech. Contractors, Inc.*, 834 F.2d 1533 (10th Cir. 1987) (finding that, while the general contractor's misdeeds increased the subcontractor's costs, the subcontractor also had significantly underbid the job);

sense is that well over half of the cases that award restitution of costs above contract price can be explained in the same way as *Boomer*.<sup>22</sup>

*Boomer* belongs alongside a group of cases that do not involve use of the elective restitution remedy on breach. In this second group of cases, the plaintiff performs a disputed contractual obligation under protest and then brings a restitution claim to recover the extra cost. *ABC Electric, Inc. v. Nebraska Beef, Ltd.*<sup>23</sup> is one such case. A subcontractor and a general contractor disagreed about the scope of electric work to be done by the subcontractor on a construction project.<sup>24</sup> The general contractor claimed that the subcontractor had agreed to do all the work required.<sup>25</sup> The subcontractor claimed that he agreed only to do the work in the job specifications.<sup>26</sup> The subcontractor went ahead and did all of the electric work demanded by the general contractor and then he brought a restitution claim for the cost of the extra work.<sup>27</sup> The court agreed with the subcontractor's position on the scope of work and awarded him restitution.<sup>28</sup>

In a similar vein, a 1999 English case, *Nuridin & Peacock Plc. v. D.B. Ramsden & Co.*,<sup>29</sup> allowed a tenant to recover excess rent that it

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United States v. Algernon Blair, Inc., 479 F.2d 638 (4th Cir. 1973) (finding that subcontractor withdrew when general contractor refused to pay cost of crane rental); *In re Estate of Lampert*, 896 P.2d 214 (Alaska 1995); *In re Montgomery Estate*, 6 N.E.2d 40 (N.Y. 1936) (holding that an attorney who was discharged without cause after partial performance was entitled to recovery of more than \$10,000, although contract price for full performance was \$5,000). In *Paterno & Sons, Inc. v. Town of New Windsor*, 351 N.Y.S.2d 445 (1974), there is a sharp dissent to a decision endorsing a potential restitution award of over four times the contract price. The dissent argues that in the New York decisions relied upon by the court, the award of restitution damages responded to problems of proof. *Id.* at 449 (Benjamin, J., dissenting).

22. From a reading of the cases collected in the Palmer and Corbin treatises, it appears that the number of misfits is fairly high, though still less than half. The number of misfits is much lower in cases collected under West Key Number 65 for Implied and Constructive Contracts. I found a number of additional fits and no clear additional misfits in the cases dating back to 1984.

23. 249 F.3d 762 (8th Cir. 2001); see also *Associated Wrecking and Salvage Co. v. Wiekhorst Bros. Excavating & Equip. Co.*, 424 N.W.2d 343 (Neb. 1988). *National Farmers Union Property & Casualty Co. v. Fuel Recovery Co.*, 432 N.W.2d 788 (Minn. App. 1988), allowed recovery on the theory that the additional work was necessitated by a supervening event outside the scope of the original contract. The contractor in that case was hired to clean up a leak from a fuel tank, and ended up cleaning the effect of a second leak. *Id.* at 789-90. The contractor and its employer (an insurer) disputed whether the contract was for a fixed price or whether it was cost-plus. *Id.* at 790.

24. *ABC Electric*, 249 F.3d at 767.

25. *Id.* at 765-66.

26. *Id.* at 766.

27. *Id.* at 767.

28. *Id.* at 768.

29. 1 W.L.R. 1249 (Ch. 1999). The case also involved overcharges before the tenant was aware of the possibility it was being overcharged. Recovery of those overcharges presented no issue. *Id.* at 1259-61.

paid under protest in a dispute over the calculation of rent. The same general issue has repeatedly arisen in the context of liability insurance. A liability insurer disputes coverage of a third party claim, but nevertheless provides a defense or pays to settle the claim under protest. The cases are split on whether an insurer may recover its expense in this situation, assuming it can establish that the claim was not covered.<sup>30</sup>

The second group of cases is the more interesting doctrinally. The law of restitution may not be needed to reach the result in *Boomer*, given modern rules of contract law. This was not always so. The first Restatement of Contracts categorically precludes awarding expenses above the contract price as contract damages.<sup>31</sup> A plaintiff in *Boomer's* situation might also run afoul of the traditional contract law

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30. *Lansing Board of Water & Light v. Deerfield Insurance Co.*, 183 F. Supp. 2d 979, 991 (W.D. Mich. 2002), holds that an insurer has a right in restitution to recover an amount paid under protest to settle an uncovered claim in the absence of a reimbursement agreement. Coverage turned on the scope of the pollution exclusion. *Grinnell Mutual Reinsurance Co. v. Shierk*, 996 F. Supp. 836 (S.D. Ill. 1998), holds that an insurer may recover the cost of a defense tendered under a reservation of rights. *Id.* at 839. Coverage turned on whether the insured had committed a crime when he shot his wife. *Id.* at 838. The decision seems to rest on a contract theory—that the insured agreed to reimburse defense costs when it did not stop the insurer from proceeding under a reservation of rights. *Id.* at 838-39. The insured had said it would not agree to any reimbursement obligation. *Id.* at 839. *Walbrook Insurance Co. v. Goshgarian & Goshgarian*, 726 F. Supp. 777, 777-84 (C.D. Cal. 1989), and *Knapp v. Commonwealth Land Title Insurance Co.*, 932 F. Supp. 1169, 1172 (D. Minn. 1996), are similar. *Hecla Mining Co. v. New Hampshire Insurance Co.*, 811 P.2d 1083, 1089 (Colo. 1991) (en banc), states that an insurer faced with a claim that might be within the pollution exclusion (which turned on whether the discharge was sudden and accidental) can defend under a reservation of rights and recover its costs, should the facts at trial prove the claim was not covered. *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997), addresses a related problem framing the issue in restitution. California law requires the insurer to defend all the claims in a “mixed” action. *Id.* at 775. Here, a defamation claim was covered under the Comprehensive General Liability policy, but other claims were not. *Id.* at 770. *Buss* holds that the insurer has a right to reimbursement for costs that are allocable to defending uncovered claims. *Id.* at 775. *Blue Ridge Insurance Co. v. Jacobsen*, 10 Fed. Appx. 563, 2001 WL 580804 (9th Cir. 2001), extends *Buss* to enable an insurer to recover an amount paid to settle a claim in a coverage dispute.

*Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), denies restitution of an amount paid under protest to settle a claim that was later determined to be uncovered. *Shoshone First Bank v. Pacific Employers Insurance Co.*, 2 P.3d 510 (Wyo. 2000), denies reimbursement for the costs of defending uncovered claims in a mixed action.

For an intelligent analysis of the cases see Robert H. Jerry II, *The Insurer's Right to Reimbursement of Defense Costs*, 42 Ariz. L. Rev. 13 (2000). Jerry criticizes grounding this right in restitution because he believes the law of restitution is too unstable. *Id.* at 64 n.197. Instead, he suggests a contractual ground—an interim settlement of an unliquidated claim. *Id.* at 69-73. Douglas R. Richmond, *Reimbursing Insurer's Defense Costs: Restitution and Mixed Actions*, 35 San Diego L. Rev. 457 (1998), provides a good review of the cases, particularly those in California.

31. Restatement (First) of Contracts § 333 (stating that expenditures in performance of a contract “are not recoverable in excess of the full contract price promised by the defendant”).

rule requiring that damages be proven with reasonable certainty, assuming he could not isolate the expenses attributable to the defendant's breach.<sup>32</sup> Modern rules of contract law are more flexible. The "total cost" method of calculating damages under a construction contract when a defendant hinders a contractor's performance is a tailored solution to the *Boomer* problem.<sup>33</sup>

It is much more difficult to fashion a contract claim in the situation of *ABC Electric*.<sup>34</sup> A person's good faith demand for work that is not within the scope of the contract is not a breach of contract, so long as the person does not withhold or threaten to withhold his own performance in making the demand.<sup>35</sup> Nor is it possible to find an implied-in-fact contract because it is clear that the person demanding performance as a matter of right did not agree to pay for it outside of the contract.

*ABC Electric* and *Nurdin* also pose doctrinal difficulties in the common law of restitution. Gerhard Dannemann observes that German courts regularly give restitution in the situation of *Nurdin* while the English court strained to reach that result.<sup>36</sup> Dannemann attributes this to different general rules atop what the Germans call the law of unjustified enrichment and what the English call the law of restitution.<sup>37</sup> In German law, Dannemann explains, "an enrichment is

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32. *Green Plumbing, Inc. v. Turner Construction Co.*, 742 F.2d 965 (6th Cir. 1984), is a representative case in which a contractor recovered nothing on a delay claim because of his inability to isolate damages.

33. *Thalle Constr. Co. v. Whiting-Turner Contracting Co.*, 39 F.3d 412, 418-19 (2d Cir. 1994) (applying New York law). *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968), a leading case, requires that: (i) the nature of the loss make it impossible to determine damages to a reasonable degree of certainty; (ii) the original bid was realistic; (iii) the actual costs were reasonable; and (iv) the contractor was not at fault. *Id.* at 426. Bernard A. Aaen, *The Total Cost Method of Calculating Damages in Construction Cases*, 22 Pac. L.J. 1185, 1188 n.10 (1991), reports that a majority of recent cases since the late 1970s adopted this method and cites only two dissenting cases. For a recent case that rejects the "total cost" method because of the uncertainty of obligation, see *Amelco Electric v. City of Thousand Oaks*, 38 P.3d 1120 (Cal. 2002).

34. *Fairbanks North Star Borough v. Kandik Construction, Inc. & Associates*, 795 P.2d 793 (Alaska 1990), draws precisely this line between restitution and contract. It holds that a claim for cost overruns resulting from work in the scope of the original contract must be brought in contract, while a claim for work completed outside the scope of the original contract must be brought in restitution. *Id.* at 800.

35. See *Reiss v. Murchison*, 503 F.2d 999 (9th Cir. 1974) (holding that the filing of a claim of total breach does not give the party against whom the claim is asserted the right to halt performance); see also *In re Chateaugay Corp.*, 104 B.R. 637 (S.D.N.Y. 1989); *Dixie Roof Decks, Inc. v. Borggren/Dickson Constr., Inc.*, 395 S.E.2d 19 (Ga. Ct. App. 1990); *Oak Ridge Constr. Co. v. Tolley*, 504 A.2d 1343, 1348 (Pa. Super. Ct. 1985). For a case holding that asserting a claim in bad faith is not a repudiation amounting to default, see *Bill's Coal Co. v. Board of Public Utilities*, 682 F.2d 883 (10th Cir. 1982).

36. Gerhard Dannemann, *Unjust Enrichment by Transfer: Some Comparative Remarks*, 79 Tex. L. Rev. 1837, 1852-53 (2001).

37. *Id.* at 1850. The American cases awarding restitution damages tend to rely on



unjustified . . . rather than unjust . . . unless there is a specific legal reason why it should be kept. . . . [T]his general rule is the exact opposite of the English general rule that the enrichment need not be given up."<sup>38</sup> In *Nurdin*, the court relied on the theory of mistake of law. This theory is inconsistent with the well-settled and useful precept that the doctrine of mistake does not protect someone who performs an obligation that he knows is doubtful.<sup>39</sup> Losing a calculated bet may be a result of misjudgment, it is not a mistake in the conventional meaning of the term. Duress may seem like a plausible alternative ground for restitution, but the plaintiff in these cases usually does not face the sort of dire and unredressable consequences that are necessary to sustain a duress claim should he not perform as demanded.<sup>40</sup>

These difficulties are a product of legal doctrine. *Boomer* and *ABC Electric* are similar in that in both cases the plaintiff performed a disputed obligation under protest and then sued to recover the resulting cost. If *Boomer* truly is an easy case to explain, as some have said, then a rule can be crafted to cover both it and *ABC Electric*, which would solve the doctrinal problem. So on to the next question.

### B. What Is the Right Rule?

George Cohen said *Boomer* is the "easiest case to explain" because "the breaching party contributes to making the contract a losing one."<sup>41</sup> But the plaintiff in *Boomer* also was responsible for the cost overrun. He could have stopped work after Storrie breached rather than running up costs. Andrew Kull is on to something when he argues that

a rule permitting a restitutionary recovery unlimited by the contract

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the general principle of unjust enrichment. *E.g.*, *Associated Wrecking & Salvage Co. v. Wiekhorst Bros. Excavating & Equip. Co.*, 424 N.W.2d 343 (Neb. 1988).

The defendant clearly benefited from the labor of the plaintiff; thus, the plaintiff should be awarded the reasonable value of the services rendered. Stated another way, this law of restitution "deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss."

*Id.* at 348-49 (citation omitted); *see also ABC Elec., Inc. v. Neb. Beef, Ltd.*, 249 F.3d 762, 765 (8th Cir. 2001) ("Under the Nebraska law of quantum meruit, ABC is entitled to recover the reasonable value of electrical services that it performed for Nebraska Beef's benefit in circumstances that would make it inequitable for Nebraska Beef not to pay.").

38. Dannemann, *supra* note 36, at 1840.

39. *Armco, Inc. v. Southern Rock, Inc.*, 696 F.2d 410, 412 (5th Cir. 1983), relies on the precept that the doctrine of mistake will not protect someone who pays a debt in willful ignorance to deny a claim seeking restitution of payments made to third parties in a dispute.

40. *CTN Cash & Carry Ltd. v. Gallaher Ltd.*, 4 All E.R. 714 (Eng. C.A. 1994), rejects a duress claim.

41. Cohen, *supra* note 18, at 1304.

price has the effect of undoing the allocation of risks negotiated by the parties, indeed of writing a new contract to replace the one the defendant has breached or repudiated. A defendant . . . is held to a bargain he did *not* make . . . .<sup>42</sup>

To allow a person to proceed with performance in response to an alleged breach or a contested demand for performance by the other contracting party, and then recover for the cost of performance outside the contract, imposes an obligation on the other party that he did not agree to undertake.

A stronger version of the argument is made as justification for denying a liability insurer restitution from its insured for the cost of defending or settling an uncovered claim when the insurer provides a defense or pays to settle a claim on which it disputes coverage.

[T]o allow the insurer to force the insured into choosing between seeking a defense under the policy, and run the potential risk of having to pay for this defense if it is subsequently determined that no duty to defend existed, or giving up all meritorious claims that a duty to defend exists, places the insured in the position of making a Hobson's choice.<sup>43</sup> Furthermore, endorsing such conduct is tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract.<sup>44</sup>

This argument can be sharpened. Sometimes an insurer is willing to pay more to settle a claim than its insured because the insurer is wealthier and has more assets at risk. Or an insurer may be willing to pay more to defend a claim because it is a repeat player. In either event, giving the insurer a right to restitution for settlement or defense costs if the claim is uncovered puts the insured in a dilemma—the insured must either withdraw his request for coverage or submit to the risk of being put to a welfare-reducing exchange.

This phenomenon is not unique to the insurance context. It could have occurred in *Boomer*. Perhaps the cost overrun was due to Boomer's effort to meet the original deadline. Perhaps Storrie would have preferred a delay in completion to paying almost double the price for the work if those were his only choices. If so, then allowing Boomer to continue to work while the parties dispute responsibility for the cost overruns and later recover its costs if it is in the right puts Storrie in much the same dilemma as the insured in the above

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42. Kull, *supra* note 10, at 1472 (footnotes omitted).

43. This is a misuse of the term. A Hobson's choice is no choice at all. The storied origin is Thomas Hobson, a stable keeper in Cambridge, England, who required his customers to take the horse nearest the stable door or none. Cambridge City Council, *Thomas Hobson 1544 – 1630*, at [www.cambridge.gov.uk/cambridge800/hobson.htm](http://www.cambridge.gov.uk/cambridge800/hobson.htm) (last visited Nov. 11, 2002).

44. *Shoshone First Bank v. Pac. Employers Ins. Co.*, 2 P.3d 510, 516 (Wyo. 2000) (citing Order on Plaintiff's Motion for Summary Judgment, *America States Ins. Co. v. Ridco, Inc.*, Civ. No. 95CV158D (D. Wyo. 1999)). This argument is cited with approval in *Matagorda County*, 52 S.W.3d 128, 135 (Tex. 2000). See *supra* note 30.

example. To avoid the risk of a welfare-reducing exchange if Boomer is in the right on the underlying dispute, Storrie must either renegotiate, which would require it to give up its claim of a right to have the work done on time at the original price, or it must bar Boomer from the site, which a court might hold to be a material breach of contract by Storrie, even if Storrie is in the right on the underlying dispute.

To answer this argument, I begin by situating the problem in the law. The problem can be thought of as defining background rules of engagement when a dispute about contract rights or obligation arises before performance. Sometimes the background rules of engagement favor finality in the sense that if a person performs or accepts performance in a dispute, that will be the end of the matter, and any claim he might otherwise have will be cut off. But sometimes the background rules do not make performance final; a person may perform or accept performance in a dispute and later press his claim of a right to do or to receive something else.

Contrasting these two bodies of rules suggests a common sense analysis that preserves a claim of right when a party performs in a dispute if such performance avoids a loss and does not unduly complicate litigation. This doctrinal argument is supported by a policy argument that such a background rule is likely to be in the joint interest of all of the parties to a contract.

Another argument made in the insurance cases for denying restitution can be quickly dispatched. The argument is that a person should resolve a dispute about his rights or obligations before accepting performance or performing by getting a declaratory judgment.<sup>45</sup> Often this is not a realistic option. Getting a final judgment in a hard-fought civil case can take years in the United States.<sup>46</sup> There are no preliminary declaratory judgments.<sup>47</sup> In the

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45. See *Shoshone First Bank*, 2 P.3d at 516.

46. John Goerdt et al., *Nat'l Center for State Courts, Examining Court Delay: The Pace Of Litigation in 26 Urban Trial Courts*, 1987 xiii (1989) (finding that while seven of the twenty-six large urban trial courts studied disposed of felony cases within one year of arrest and fourteen had ten percent or less pending at one year after arrest, only two courts were close to disposing of civil cases within two years of filing); Steven K. Smith et al., *Bureau of Justice Statistics, Special Report, Tort Cases in Large Counties* (Apr. 1995) (average time to dispose of tort case in the nation's seventy-five largest counties was slightly more than one and one half years; average time for processing of cases that were tried was two years).

47. See *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975) ("[P]rior to final judgment there is no established declaratory remedy comparable to a preliminary injunction . . ."). Sometimes a preliminary injunction may be sought to compel the other party to perform. In most cases where a preliminary injunction is sought in a contract setting the plaintiff seeks to prevent the defendant from acting in a way that would make performance impossible. For example, a buyer will seek an injunction to prevent a seller from disposing of property that is under contract. Courts are reluctant to grant preliminary injunctions in such cases even when the property is unique. *Texaco-Pennzoil*, which resulted in a multi-billion dollar verdict on a theory of tortious

particular context of liability insurance—where coverage disputes often are resolved by declaratory judgment—the availability of a declaratory judgment is circumscribed by a doctrine that stays the declaratory judgment action when the coverage determination turns on facts that will be resolved in the underlying litigation.<sup>48</sup>

### 1. Rules of Engagement for Contract Disputes

The voluntary payment doctrine is the preeminent rule of finality when a person performs a disputed obligation. The doctrine bars a debtor who pays a disputed debt from bringing a restitution claim to recover the payment.<sup>49</sup> The rationale for the doctrine is to ensure “that those who desire to assert a legal right do so at the first possible opportunity; this way, all interested parties are aware of that position and have the opportunity to tailor their own conduct accordingly.”<sup>50</sup> Other rules eliminate a later claim by a creditor who accepts part payment for the balance of his claim. The rules on accord and satisfaction permit what has been described as “an exquisite form of commercial torture”<sup>51</sup> by enabling a debtor to tender part payment of a disputed debt that the creditor can take only if he relinquishes his claim for the balance.<sup>52</sup> And a creditor has little hope of avoiding a

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interference, provides a notable illustration. When Getty and Texaco announced their deal, Pennzoil, the disappointed suitor for Getty, immediately sought a preliminary injunction in the Delaware Court of Chancery. The court denied the request for an injunction, though it found that Getty would probably win on the merits on the contract claim against Pennzoil and that it would suffer irreparable injury because the injunction would also implicate third parties—Gordon Getty and Texaco—against whom Getty’s claim was less certain. The unreported decision is *Pennzoil*, Civ. A. No. 7425, 1984 WL 15664 (Del. Ch. Feb. 6, 1984). When a contract does not involve a unique asset, plaintiffs run into the traditional view that loss of money, even if difficult to measure, is not irreparable injury sufficient to justify a preliminary injunction. Douglas Laycock, *The Death of the Irreparable Injury Rule* 112, 121-22 (1991).

48. *E.g.*, *Wis. Power & Light Co. v. Century Indem. Co.*, 130 F.3d 787, 794 (7th Cir. 1997); *Montrose Chem. Corp. of Cal. v. Superior Court*, 861 P.2d 1153, 1164 (Cal. 1993); *Murphy v. Urso*, 430 N.E.2d 1079 (Ill. 1982) (Kennard, J., concurring); *Chesapeake Physicians Prof’l Ass’n v. Home Ins., Co.*, 608 A.2d 822 (Md. Ct. Spec. App. 1992); *Allstate Ins. Co. v. Atwood*, 572 A.2d 154 (Md. Ct. Spec. App. 1990). *But see* *Reisen v. Aetna Life & Cas.*, 302 S.E.2d 529 (Va. 1983).

49. *See* Restatement (Third) of Restitution and Unjust Enrichment § 6 cmt. e & illus. 18 (Tentative Draft No. 1, 2001) (stating that the voluntary payment rule will bar recovery of payment of disputed claim). Reporter’s Note (e) provides additional authority.

50. *Randazzo v. Harris Bank Palatine*, 262 F.3d 663, 668 (7th Cir. 2001).

51. *James J. White & Robert S. Summers, Handbook of the Law Under the Uniform Commercial Code* § 13-21, at 544 (2d ed. 1994). This sentiment is echoed in *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 488 N.E.2d 56, 59 (N.Y. 1985).

52. The history of Uniform Commercial Code § 1-207 attests to the strength of this practice. The statute allows a party to reserve his rights while accepting performance offered by the other party. Although, at first, the statute did not have an explicit exception, many courts held that this provision did not apply to an accord and

release on the ground of duress because of a precept foreclosing claims of financial distress.<sup>53</sup>

The voluntary payment doctrine has the familiar stickiness of an interpretive presumption. Payment is final unless the parties state clearly that this was not their intent. The rule is sticky in another, more unusual way. Under the traditional rule, a debtor cannot avoid the voluntary payment doctrine by saying when he pays that he reserves his right to recover the money if it is not due.<sup>54</sup> The rules on accord and satisfaction (and the precept foreclosing a duress claim)

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satisfaction. *Air Van Lines, Inc. v. Buster*, 673 P.2d 774 (Alaska 1983), is a leading case holding that the statute did not alter the common-law rule. For a contrary case that reviews the arguments and authority on both sides, see *Horn Waterproofing Corp.*, 488 N.E.2d at 56. An explicit exception was added to the Uniform Commercial Code in 1990.

53. One often-litigated question involves the effectiveness of a release given by a creditor to settle a disputed debt when, in exchange for the release, the debtor pays a sum that was not in dispute. The weight of the authority supports the premise that a release is valid in these circumstances, provided there is a single debt or closely related debts. *Kilander v. Bickle Co.*, 571 P.2d 503, 504-05 (Or. 1977) (en banc). There is authority, however, that "circumstances of unfair pressure or economic coercion" cut in the other direction. *Flagel v. S.W. Clinical Psychiatrists*, 755 P.2d 1184, 1190 (Ariz. App. 1988).

54. For clear statements that a reservation of rights does not avoid the voluntary payment doctrine, see *Rowe v. Union Central Life Insurance Co.*, 12 So. 2d 431, 433-34 (Miss. 1943), and *Relaxation of Common-law Rule Regarding Recovery of Voluntary Payment*, 75 A.L.R. 658 (1931) (stating that a payment may not be recovered "though the payer makes the payment with an express reservation of his right to litigate the claim"). This rule is codified in Georgia. Ga. Code Ann. § 13-1-13 (1982). The Restatement (Third) of Restitution and Unjust Enrichment will take this position.

A handful of cases hold that a reservation of rights avoids the bar of the voluntary payment doctrine. See *Cnty. Convalescent Ctr. of Naperville, Inc. v. First Interstate Mortgage Co. of Ill.*, 537 N.E.2d 1162, 1164 (Ill. 1989) ("[S]ince plaintiff paid the 30 days' interest 'under protest,' plaintiff is not barred from recovery under the voluntary-payment doctrine."); *Avianca, Inc. v. Corriea*, Civ. A. No. 85-3277 (RCL), 1992 WL 93128, at \*7 (D.D.C. Apr. 13, 1992) ("The voluntary payment doctrine does not generally apply, however, when a party has expressly reserved a right to take some legal action or when the party has paid under protest."). A few other cases state in dicta that a debtor could have reserved his rights. *Randazzo*, 262 F.3d at 671; *Prenalta Corp. v. Colo. Interstate Gas Co.*, 944 F.2d 677 (10th Cir. 1991); *City of Miami v. Keton*, 115 So. 2d 547, 552 (Fla. 1959); *Getto v. City of Chicago*, 426 N.E.2d 844 (Ill. 1981); *Putnam v. Time Warner Cable of S.E. Wis.*, 633 N.W.2d 254, 263 (Wis. 2001).

The older cases tend to treat protest as evidence of duress. This comes from framing the issue as a problem in restitution. If the issue is framed as a problem in contract, then the question is what will establish an agreement by the payee that the payment is conditional upon the validity of his claim. Such an agreement avoids the bar of the voluntary payment doctrine. See Restatement of Restitution § 45 cmt. e (1937) ("The rule stated in this Section does not apply if the parties have agreed that the payment is conditional upon the validity of the transferee's claim."). The general principle that the offeror is master of the offer supports the minority view that if the payor conditions payment on a reservation of rights, the payee acquiesces when he accepts the payment. The court in *Prenalta Corp.* approached the issue from this perspective. 944 F.2d at 685.

are similar in that they prevent the creditor from unilaterally reserving his right to sue for the balance if he takes part payment tendered in satisfaction of his claim. The upshot of these rules is that avoiding finality requires both parties' assent.<sup>55</sup>

Performance is not always final under the common law. Sometimes a person may perform (or accept performance) in a dispute and still have his day in court. The extreme facts of *Henrici v. South Feather Land & Water Co.*<sup>56</sup> make it a good case for illustrating this side of the law. South Feather assumed a long-term contract to supply water to Henrici's farm.<sup>57</sup> It later proposed a new pricing scheme that slightly increased Henrici's payments.<sup>58</sup> Henrici denied that South Feather had the right to increase price and he refused to take water on the new terms, although this resulted in the ruin of his farm.<sup>59</sup> The court held that while Henrici was correct in the underlying dispute he could not recover for the damage to his farm because he should have mitigated damages by taking the water and later suing to recover the over-payment.<sup>60</sup> The court's reasoning assumes that the voluntary payment doctrine would not have barred a suit by Henrici to recover an overpayment. The opinion does not mention the doctrine.<sup>61</sup>

Changing the facts in *Henrici* illustrates other rules on this side of the law. What would have happened had South Feather offered the water on the condition that Henrici irrevocably submit to paying the price demanded? This is the accord and satisfaction gambit. Clearly, Henrici could recover for the loss of his farm if he refused the water

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55. The rule under the voluntary payment doctrine—that the payor cannot unilaterally reserve rights—is the more interesting side of this coin, for it is inconsistent with the general principle that the offeror is master of the offer. The payor is really making a settlement offer.

56. 170 P. 1135 (Cal. 1918). Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va. L. Rev. 967, 1005 n.99 (1983), collects other cases holding that a promisee acted inappropriately in refusing to do business with a defaulter. The article claims that courts recognize a duty to do business with a defaulter when there are significant gains from cooperation and there is no bad faith extortion and risk of under-compensation.

57. 170 P. at 1137.

58. *Id.* at 1136.

59. He had no other source of water for irrigation. *Id.*

60. *Id.* at 1137.

61. Presumably Henrici had another option. He might have tendered the old price pending resolution of the dispute. Had South Feather responded to this tender by cutting off the water supply, that would have been a material breach and it would be responsible for the damage to Henrici's farm. Henrici's tender of the old price would not have been a breach material enough to justify suspension of performance by South Feather because any loss from underpayment could have easily been compensated should South Feather have been in the right. Further, Henrici's tender of the old price would have been in good faith. In sum, Henrici had two choices in the case—he could have paid either the new or the old price pending resolution of the dispute—between which the law is indifferent. This is sensible because, putting issues like insolvency and collection to the side, there is no reason to prefer one party over the other when we ask who should hold money in dispute pending resolution.

and turned out to be in the right on the pricing dispute. His duty to mitigate would not require him to relinquish his claim of a right to pay less.<sup>62</sup> Moreover, under U.C.C. § 1-207, Henrici might still be able to take the water and reserve his rights by saying that he was doing so.<sup>63</sup> This response enables Henrici to test South Feather's resolve because South Feather would have to follow through on its threat to stop delivery of water in response to Henrici's refusal to abandon his claim of a right to the old price.

The law even might have allowed Henrici to deceive South Feather to defuse the conflict. If Henrici had agreed to South Feather's demand to get the water he desperately needed, he might have been able to avoid the contract by claiming duress. South Feather's threat to withhold water was borderline extortion and a core instance of bad faith because the threatened action of cutting off the water would inflict a large loss on Henrici while yielding a small benefit to South Feather.<sup>64</sup> The effect of the doctrine of duress and U.C.C. § 1-207 is to allow a person to decide unilaterally, against the expressed will of the other party to the contract, that performance is not final. This is the opposite of the voluntary payment doctrine and cognate rules, which make performance final unless both parties agree to the contrary.

The boundaries between these two sets of rules are not well-defined. There is little in the voluntary payment doctrine to preclude its application had Henrici paid what South Feather demanded.<sup>65</sup>

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62. "If the party in breach offers to perform the contract for a different price, this may amount to a suitable alternative. But this is not the case if the offer is conditioned on surrender by the injured party of his claim for breach." Restatement (Second) of Contracts § 350 cmt. e (1981); see *id.* at illus. 15 (based on *Gilson v. F.S. Royster Guano Co.*, 1 F.2d 82 (3d Cir. 1924)); see also 5 Corbin on Contracts § 1043, at 274-75 (2d ed. 1962) (stating that there is no duty to take substitute performance from defaulting party if it would involve a surrender of rights, compromise, or accord and satisfaction).

63. U.C.C. § 1-207 (2001). This is implicit in the line of cases holding that a creditor can use § 1-207 to take payment offered in satisfaction and then sue for the balance.

64. Restatement (Second) of Contracts § 176(2)(a) defines a threat as improper "if the resulting exchange is not on fair terms" and "the threatened act would harm the recipient and would not significantly benefit the party making the threat." *Silsbee v. Webber*, 50 N.E. 555 (Mass. 1898) (involving a threat by employer directed at employee's mother to tell his ill father of his theft if mother did not pay off the loss), is an example in the blackmail mold. John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 Mich. L. Rev. 253, 282-88 (1947), proposes disproportionality as an organizing principle.

65. Palmer argues that doubt about a debt should not always bar recovery of a payment. He cites *Pilot Life Insurance Co. v. Cudd*, 36 S.E.2d 860, 862 (S.C. 1945), where an insurer was allowed to recover death benefits paid for a sailor missing at sea after the government issued a certificate stating the insured "is presumed to have died." A policy favoring quick payment of insurance claims is said to support such decisions. An important factor was the war-time setting, which made it impractical for the insurer to investigate the claim to resolve the uncertainty. Palmer adds that the result should be otherwise if the insurer paid less than the full amount for that would suggest the payment was a compromise of a disputed claim. George E. Palmer,

Duress would have been difficult to make out because South Feather did nothing improper in making a demand in good faith and Henrici had an alternative to paying the price demanded, he could have paid the old price. One court has drawn a boundary between the rule in U.C.C. § 1-207(1),<sup>66</sup> which allows a party to perform or accept performance in a dispute while reserving his rights, and the common-law rule of accord and satisfaction, which does not. The case holds that section 1-207(1) applies in a continuing dispute on an executory contract.<sup>67</sup> The rule is a bit overbroad. Under the rule, Henrici could not have tried to force a settlement on his terms by tendering a check for the old price in satisfaction, which seems like the right result.<sup>68</sup> But it also means that a lessee could never rely on payment in satisfaction to resolve a dispute over past rent on a continuing lease, which is difficult to justify. At the heart of the doctrine of duress is a concern with threats that would inflict disproportionate harm if carried out.<sup>69</sup> The concern with disproportionality gets at a crucial factor in these cases. But the law of duress is quite fuzzy once one gets beyond a few core cases of classically wrongful threats, and there are cases stating categorically that "it is not duress for a party to insist upon what he believes to be his legal rights."<sup>70</sup>

These are threads in a larger tapestry. The law of waiver and estoppel has a great deal to say about when a person may lose rights by not insisting upon them. The doctrine of material breach has a great deal to say about when a person may withhold performance to protect his rights. In another article, I show that three interests explain much of the tapestry. These are: (1) the interest in vindicating rights (familiarily expressed by the expectation principle); (2) the interest in efficient performance (familiarily expressed by the mitigation principle); and (3) the interest in minimizing the cost of contract administration, including uncertainty (less familiarily expressed by the interest in remedial certainty).<sup>71</sup> More simply, the

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Law of Restitution § 14.7 (1978).

66. This is the rule that permits a party to perform or assent to performance in a manner demanded or offered by the other party while reserving his rights by stating that he acts "under protest" or like words.

67. *Air Van Lines, Inc. v. Buster*, 673 P.2d 774 (Alaska 1983).

68. The concern is that after rightfully rejecting the check, South Feather would have halted delivery of water for total non-payment.

69. The Restatement (Second) of Contracts § 176(2)(a) defines a threat as improper "if the resulting exchange is not on fair terms" and "the threatened act would harm the recipient and would not significantly benefit the party making the threat." Comment f misfires by suggesting that the concern is with malice or vindictiveness rather than with coercion. Illustration 12 gives as an example an employer's threat to prevent an employee from working elsewhere if he does not release a claim. The employer makes the threat for his own gain and not out of malice. If he carries out the threat he probably does it to retain his credibility.

70. *Jacobs v. Atlantco Ltd.* P'ship No. 1, 373 A.2d 1255, 1261 (Md. Ct. Spec. App. 1977).

71. Mark P. Gergen, *Exit and Loyalty in Contract* (forthcoming in a collection of



goal is to execute a bargain at the least cost and with the least fuss.

The different responses to payment of a disputed claim in a run-of-the-mill case of a disputed debt and *Henrici* are easily explained in terms of these interests. In the run-of-the-mill case, there is no immediate allocative gain from performance because payment only alters who holds the money. Should the creditor refuse to accept part payment, then the resulting delay in payment tends not to complicate the litigation or to make it more difficult to vindicate the rights of whoever is in the right. If the creditor is in the right, then he can be compensated for the delay in payment by adding interest. In *Henrici*, non-performance had terrible consequences—the destruction of a farm. And given the small amount of money in dispute it would have been very easy for a court to put *Henrici* in his rightful position if he had paid what was demanded.

It is easy to justify restitution in *Boomer v. Muir* in these terms. Boomer's decision to stay on the job saved time and money, unless another contractor could have done the work significantly more quickly and cheaply, and there is no suggestion of that in the case. Vindicating rights after performance is not as easy as it is in the situation of *Henrici*, where it is just a matter of determining who was entitled to the money in dispute and then adding interest to compensate for under or overpayment. But Boomer's decision to continue work did not make the litigation any more difficult. Exact justice is difficult whether Boomer stays or goes. If Boomer goes and is in the right in the underlying dispute, then putting him in his rightful position requires predicting the profit (or loss) he would have earned had Storrie not breached. If Boomer stays, then putting him in his rightful position requires much the same determination. The simple solution of awarding Boomer his costs may over or undercompensate either way. If Boomer is in the wrong, then his staying simplifies litigation by minimizing the potential consequential damages from delay.

## 2. A Contingent Right to Reimbursement Is Likely To Be in the Joint Interest of the Parties to a Contract when There Is a Significant Gain from Performance

This does not directly answer the best argument for denying a person who performs a disputed obligation a contingent right to reimbursement. The best argument is that granting this right imposes on the other party to the contract an obligation that he did not voluntarily undertake. More precisely, it puts the other party in a dilemma in which he must either withdraw his claim of a right to the performance or submit to the risk of being subjected to a new

obligation beyond his original contract. In the context of liability insurance, it is easy to imagine that the other party is made worse off by the forced exchange because the insurer may be willing to pay more to defend or settle the claim than would the insured.

This dilemma is not in itself a reason to reject a contingent right to reimbursement. Denying a person who may be under an obligation to perform a contingent right to reimbursement if he is in the right puts him in a predicament that is the mirror image of the other party's dilemma. He can assert his right not to perform on the contract only by withholding performance, which subjects him to a contingent obligation to compensate the other party for loss from non-performance should he be in the wrong in the underlying dispute. Either rule is going to be unfair to someone in that one of the parties will be disadvantaged in asserting a claim of right.

One way to get beyond the standoff between these arguments is to ask what arrangement is likely to be in the parties' joint interest. In a contractual setting, the answer to this question usually will be a contingent right to reimbursement. The analysis that follows considers only the effect of the rule on performance. This effect is so strong that it likely overwhelms any second-order effects even should they cut in the other direction, although there is no reason to expect that they do.<sup>72</sup>

To simplify, I begin with the more general case where *A* must decide whether to perform an act that may benefit himself or *B* depending on how a contingency is resolved. Assume *A* and *B* dispute ownership of an asset. *A* has possession. *A* is presented with a one-time opportunity to spend *c* to improve the value of the asset by *v*. This benefit will inure entirely to the asset's true owner. The contract case is importantly different from this case because the value to *A* of performance is avoiding liability to *B* should *A* be obligated to perform.

If *v* is the same for *A* and *B*, then it is in the joint interest of the parties for *A* to expend *c* if  $v > c$ . Without a contingent right to reimbursement, *A* has too little incentive to spend *c*. Defining the probability that *A* is owner as  $PR_o$ , it is in *A*'s interest to spend *c* only if  $v PR_o > c$ . If *A* is not the owner, imposing a contingent right to reimbursement brings *A*'s incentives closer into line with what is in *A*'s and *B*'s joint interest. It gives *A* an incentive to spend *c* if  $v PR_o + c(1 - PR_o) > c$ .<sup>73</sup>

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72. The most important second-order effect is on the level of care taken in writing contracts to eliminate doubts about obligation. A rule that distorts incentives on performance might be justified on the ground that it produces better incentives in drafting contracts.

73. In the special case of a disputed contractual obligation, it is possible that *B* might collect *v* from *A* if *A* does not expend *c* and he is found obligated to do so. Imposing a contingent right to reimbursement may well be in *B*'s interest as well as

Subjective devaluation<sup>74</sup> can be denoted by positing that expenditure  $c$  has a payoff of  $v_A$  to  $A$  if he is the true owner of the asset and a payoff of  $v_B$  to  $B$  if he is the true owner. Performance is in the parties' joint interest if  $v_A PR_o + v_B (1 - PR_o) > c$ . Without a contingent right to reimbursement,  $A$  has too little incentive to expend  $c$ .  $A$  has an incentive to expend  $c$  if  $v_A PR_o > c$ . With a contingent right to reimbursement,  $A$  has too much incentive to expend  $c$  if  $c > v_B$ . Expending  $c$  has a positive payoff to  $A$  if  $v_A PR_o + c (1 - PR_o) > c$ . Which rule creates worse incentives depends on the values of  $v_A$ ,  $v_B$ ,  $c$ , and  $PR_o$ .

A simple example with numbers may help to make this more concrete. An insurer estimates a 50% probability that a third party claim against its insured is covered by the policy. Should the third party claim go to trial, the expected cost is \$100,000.<sup>75</sup> Before trial, the insurer receives a settlement offer of \$80,000. Without a contingent right to reimbursement by the insured, the insurer will reject this offer even though this exposes him to a 50% risk of paying \$100,000.<sup>76</sup> This is in the interest of neither the insurer nor the insured if they put the same price on going to trial. Imposing a contingent right to reimbursement gives the insurer a net expected gain of \$10,000 if it settles the claim.<sup>77</sup> The insured also realizes a net expected gain of \$10,000 from this arrangement if it induces the insurer to settle the claim where it otherwise would not.<sup>78</sup> On the other hand, if the insured places only a \$30,000 price on going to trial,<sup>79</sup> then imposing a contingent right to reimbursement may induce the insurer to settle when that is not in the parties' joint interest. If the insurer can be certain of collecting the full \$80,000 from the insured at no cost (a

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being in  $A$ 's interest with this wrinkle. Defining the probability that  $A$  is obligated to spend  $c$  as  $PR_{ob}$ , then imposing a contingent right to reimbursement yields a return of  $(v - c (1 - PR_{ob}))$ . Imposing no such right yields a return of  $(v PR_{ob})$  if we assume imposing the right induces  $A$  to expend  $c$ .

74. I take the term from Peter Birks, *An Introduction to the Law of Restitution* 109 (1985). He uses the term to refer to the argument that we cannot know how much the defendant was enriched when he receives a benefit in kind because his enrichment depends upon individual preferences. The argument tends to support the conclusion that a person ought not be forced to pay for a benefit he did not freely accept when the value to him is doubtful, which is the traditional position of the law of restitution.

75. This is composed of the expected judgment discounted by probability plus legal fees.

76. This settlement eliminates a 50% chance of paying \$100,000 at trial at the cost of \$80,000.

77. It eliminates a 50% chance of paying \$100,000 at trial at the cost of \$80,000, less a 50% chance of recovering \$80,000 from the insured.

78. The settlement eliminates a 50% chance of paying \$100,000 at trial at the cost of a 50% chance of paying \$80,000 to the insurer.

79. Although the insurer places a higher price on going to trial, the insured might put a price of only \$30,000 on going to trial because the insured has fewer assets, thereby placing a ceiling on the amount that the insured can expect to pay in the event of a loss.

wildly unrealistic assumption), then it will accept the settlement offer because it has a positive expected return to it of \$10,000,<sup>80</sup> although this has a larger negative expected return of \$25,000 to the insured.<sup>81</sup> On the other hand, if the settlement offer is \$60,000 and the other facts are the same, then giving the insurer a contingent right to reimbursement makes it profitable for the insurer to settle,<sup>82</sup> yielding an expected gain to it of \$20,000<sup>83</sup> that exceeds the expected loss to the insured (-\$15,000).<sup>84</sup>

If the dispute is over the ownership of a strip of land and the expenditure is on an improvement that is uniquely of value to *A*'s adjacent land, then a contingent right to reimbursement gives *A* too much incentive to make the expenditure. This possibility may justify a rule in the Restatement (Third) of Restitution and Unjust Enrichment that would allow recovery of an expense in such a case only if it is for a necessity.<sup>85</sup>

Moving the problem to a contractual setting significantly lessens the risk of subjective devaluation (or, more precisely, that  $v_A > c > v_B$ , which is the problematic alignment).<sup>86</sup> That the defendant contracted for the performance or demanded it as his due increases the likelihood that it is of significant value to him. Further, in the contractual setting the value to a person of performing a disputed obligation often is avoiding the risk of liability for the other's losses on default. The value to the obligor of performing the disputed obligation will tend towards the value to the obligee.<sup>87</sup>

Showing that an exchange is likely to be efficient does not by itself justify making the exchange compulsory on the beneficiary through the law of restitution. Generally, the law of restitution compels an exchange on policy grounds only if there are significant impediments to bargaining. Human psychology is the principal impediment to rational bargaining in a contract dispute. Parties to a dispute could negotiate a contingent right to reimbursement—it is similar to a standstill agreement—but this requires a fair degree of trust in the

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80. See *supra* note 77.

81. The settlement eliminates a 50% chance of paying \$30,000 at the cost of a 50% chance of paying \$80,000.

82. Without such a right, settlement eliminates a 50% chance of the insurer paying \$100,000 at a cost of \$60,000.

83. The settlement eliminates a 50% chance of paying \$100,000 at the cost of a 50% chance of paying \$60,000.

84. The settlement eliminates a 50% chance of paying \$30,000 at the cost of a 50% chance of paying \$60,000.

85. See *infra* note 96 and accompanying text.

86. The contractual setting may also exacerbate the psychological barriers if *A*'s threat not to perform is seen by *B* as a breach of faith.

87. This principle is not categorically true in the contract setting, as the example of liability insurance shows. A person may demand performance under a contract believing that he is entitled to it at no additional cost to himself though he would be unwilling to pay the cost.

other party and sympathy for the other party's legal position. Trust and sympathy are likely to be in short supply when people disagree about their rights and obligations under a contract. Indeed, a background rule of no right to reimbursement encourages behavior that tends to raise hackles. The rule encourages a person to threaten to withhold performance even though it is common knowledge that carrying out the threat would inflict a grievous loss on the other party.

This sort of analysis cannot establish the appropriate level of generality for whatever rules we may choose to regulate performance in a dispute. In theory we might lump performance of a disputed contractual obligation together with an improvement to property of disputed ownership under a single rule, or we might have one rule for liability insurance and another for construction contracts. This analysis only tells us that the likelihood of subjective devaluation is a key consideration in designing these rules. There are other considerations in choosing the appropriate level of generality. The rule must be general enough so that lawyers can be expected to know it but narrow enough so that it can be applied without too much uncertainty at the point of application. The rule I propose fits comfortably within existing law, which suggests to me it strikes a tolerable balance on these counts.

### *C. A Rule*

The doctrinal and policy arguments support the following narrow rule:

A person who renders a performance not due under a contract has a claim in restitution against the other party to the contract if

- (a) the person reasonably believes the performance may be due under the contract or the other demands the performance as due under the contract;
- (b) the other had reason to know the person performs under protest or reserves the right to seek restitution;
- (c) the performance avoids a loss; and
- (d) the performance does not unduly complicate litigation.

The voluntary payment doctrine, which cuts off the right to reimbursement of money paid on a doubtful claim, states the opposite rule. Requirement (c) distinguishes cases covered by the voluntary payment doctrine.

A performance that consists of the payment of a disputed debt may fall within the rule, although a delay in payment would cause no

aggregate loss, if refusal of the performance due in return for the payment would cause a loss. *Henrici*<sup>88</sup> and *Nuridin*<sup>89</sup> illustrate and provide authority for this proposition. The logic is that the other may overreact to nonpayment. The doctrine of material breach deters overreaction to nonperformance by treating overreaction as a breach of contract. This rule gets at the same phenomenon by eliminating the provocation to overreact.

The case of the mechanic who knowingly exceeds the owner's instructions in working on an automobile is outside the rule because requirement (a) is not met.<sup>90</sup> The mechanic will recover only if an emergency justifies his acting without first securing a contract from the owner.<sup>91</sup> The situation in *Gidatex v. Campaniello Imports, Ltd.*,<sup>92</sup> also falls outside the rule because of the same requirement, but the plaintiff would look elsewhere in the law of restitution for a claim. In *Gidatex*, the restitution claim arose from a dispute between the plaintiff and defendant over the plaintiff's right to sell products licensed by the defendant in the United States.<sup>93</sup> After the defendant lost the license dispute, it brought a restitution claim to recover its investments, claiming that these investments enhanced the value of the license.<sup>94</sup> The court denied the restitution claim.<sup>95</sup> The decision is consistent with the Restatement (Third) of Restitution and Unjust Enrichment, which provides for restitution in this situation only if the plaintiff spares the defendant a "necessary expense."<sup>96</sup> The requirement that the expense be necessary limits restitution to the class of claims where subjective devaluation is least likely. *Leebov v. United States Fidelity & Guaranty Co.*,<sup>97</sup> and *McNeilab, Inc. v. North River Insurance Co.*,<sup>98</sup> test the limits of the concept of a necessary expense. Both cases involve restitution claims brought by an insured against its liability insurer for expenditures made to reduce the loss on an accident, but they reach opposite results.<sup>99</sup> Whatever the correct

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88. 170 P. 1135 (Cal. 1918). The decision in *Henrici* assumes that the farmer could pay what the irrigation district demanded and later sue to recover the payment if it was not due. See *supra* notes 56-61 and accompanying text.

89. 1 W.L.R. 1249 (Ch. 1999). See *supra* notes 29, 37-39 and accompanying text.

90. *J.L. Carpenter Co. v. Richardson*, 172 A. 226, 227 (Conn. 1934) (denying recovery for labor and materials to repairman who knowingly exceeded his orders).

91. *Berry v. Barbour*, 279 P.2d 335 (Okla. 1954) (awarding restitution to contractor hired to remodel theater who repaired roof after fire to prevent water damage while the owner of the theater was absent).

92. 49 F. Supp. 2d 298 (S.D.N.Y. 1999).

93. *Id.* at 298-99.

94. *Id.* at 299.

95. *Id.*

96. Restatement (Third) of Restitution and Unjust Enrichment § 24 & cmt. d (Tentative Draft No. 2, 2002).

97. 165 A.2d 82 (Pa. 1960).

98. 645 F. Supp. 525 (D.N.J. 1986).

99. In *Leebov*, a contractor sacrificed heavy machinery to stop a cave-in that would have damaged adjoining property. 165 A.2d at 84. The court held the insurer

result may be in these cases, they are not within the rule because requirement (a) is not met.<sup>100</sup>

## II. ABOLISH THE GENERAL RIGHT TO RESTITUTION ON TOTAL BREACH OF CONTRACT

The optional right to restitution on total breach of contract has been criticized on policy grounds because the rule distorts incentives in contract performance.<sup>101</sup> *Boomer v. Muir* turns out to be a bad example—the availability of restitution had desirable incentive effects in that case—but the general point still holds true. That a narrow rule could cover *Boomer* leads to the question what, if anything, is to be

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liable. In *McNeilab* the manufacturer of Tylenol undertook a massive product recall after incidents of product tampering. 645 F. Supp. at 527. The court rejected the restitution claim.

100. *Bailey v. West*, 249 A.2d 414 (R.I. 1969), is a good case for exploring the boundaries of some of the relevant rules. *B* refused to accept delivery of a horse from *S*, claiming the horse was lame. *Id.* at 415. The deliveryman took the horse to *P* who cared for it for several months. At some point during these months, *P* learned that *B* and *S* disagreed about who was responsible for the horse and that *B* had said he would have nothing to do with the horse. *Id.* *S* sued *B*, and the court determined that title in the horse had passed to *B* and that he had to pay *S* the contract price. *Id.* at 415-16. At this point *P* sued *B* for the cost of several months care. *Id.* at 415. The court denied *P*'s restitution claim on the ground that *P* was a volunteer. *Id.* at 418. It did not rely upon a crucial fact, that *P* eventually sold the horse and kept the price, which presumably was less than the cost of care. This would preclude a claim by *P* as a protector of another's property. See Restatement (Third) of Restitution and Unjust Enrichment § 21 (Tentative Draft No. 2, 2002) (limiting restitution to the loss avoided by the owner and stating that beneficiary may avoid obligation by disclaiming benefit). *P* might well have a claim as a protector of another's property had *B* taken the horse once he was determined to be the owner. The dispute between *B* and *S* over who was responsible for the horse should excuse *P*'s failure to get a reimbursement agreement.

Had the deliveryman returned the horse to *S*, who cared for the horse until ownership was resolved, then *S* would be entitled to recover the cost of care for the horse as contract damages because the cost qualifies as incidental damages. The structure of the situation is different from *Boomer v. Muir*. In the variation on *Bailey v. West*, *S*'s care for the horse minimizes his own loss on the contract should he be in the wrong; and it minimizes *B*'s damages should *S* be in the right on the underlying dispute. In *Boomer*, the subcontractor's continued work minimizes the damages he owes the general contractor should he be in the wrong in the underlying dispute, but it provides no benefit to the subcontractor should he be in the right.

101. Kull explains: "both parties acquire an incentive to expend resources, not in performance or the negotiation of appropriate contract modifications, but in strategic behavior intended to enhance their position in potential litigation. While the performing party's objective is to provoke a default, the recipient's goal is to safeguard a favorable bargain—avoiding the risk of default by excessive precautions and 'overperformance.'" Kull, *supra* note 10, at 1472.

Henry Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 Yale L.J. 14 (1982), offers an extended attack of the traditional rule on economic and liberal grounds that models a discrete decision to perform or breach by an actor who is certain of the legal consequences of his decision. For standard defenses of the option, see Palmer, *supra* note 65, § 4.4; George E. Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 Ohio St. L.J. 264 (1959).

said for the general rule beyond this situation. I join others in arguing that the general rule should be abolished.

### A. *The Traditional Rule Is a Terrible Solution to the Boomer Problem*

The traditional rule is both underbroad and grossly overbroad if the goal is to award performance in a dispute when performance avoids a loss without complicating litigation.<sup>102</sup> The rule is underbroad in two respects. First, the rule applies only in the event of breach and so it does not reach cases like *ABC Electric*, in which a person performs an obligation he disputes at the demand of the other.<sup>103</sup> Second, the rule does not apply if the plaintiff has completed performance.<sup>104</sup> The latter limitation on the rule may explain why Boomer pulled off the job shortly before the work was done.

The gross overbreadth of the traditional rule is obvious. The rule has produced some perverse decisions. Ironically, one of the more perverse, *United States v. Algernon Blair, Inc.*,<sup>105</sup> appears in many contracts casebooks as the primary case to illustrate the right to restitution on breach.<sup>106</sup> It is the worst possible teaching case unless the goal is to make the law seem idiotic. The decision rewards a subcontractor for escalating a contract dispute and abandoning work without justification. A subcontractor hired to do steel work on a large construction project disagreed with the general contractor about who was to pay the rent on a large crane.<sup>107</sup> The general contractor did not pay the disputed charge and the subcontractor pulled off the job.<sup>108</sup> The trial court reduced the subcontractor's

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102. In some states the restitution doctrine is more tailored. In the state of Washington, for example, a contractor may recover costs over contract price in restitution only if his employer's interference caused delays that "were so substantial as to remove the written contract of the parties as a practical basis for computing damages." *V.C. Edwards Contracting Co. v. Port of Tacoma*, 514 P.2d 1381, 1385 (Wash. 1973). *Port Chester Electrical Construction Corp. v. HBE Corp.*, 782 F. Supp. 837 (S.D.N.Y. 1991), *rev'd* 978 F.2d 820 (2d Cir. 1992), also predicates recovery of costs on connecting the cost increase to a delay for which the defendant was responsible. The decision was reversed and remanded to consider the import of a no damage for delay clause. *Id.* at 823. *Highland Construction Co. v. Union Pacific Railroad Co.*, 683 P.2d 1042, 1048 (Utah 1984), rejects a total cost claim because of a failure to tie the breach to costs and a restitution claim on the basis of a Utah rule that "damages are controlled by the contractual remedies fashioned by the parties unless it can be shown that the work performed was so different from the work contemplated by the contract that additional recovery in quantum meruit is warranted."

103. See *supra* notes 23-28, 34 and accompanying text.

104. Restatement (Second) of Contracts § 373(2) (1981). The Restatement justifies this on grounds of remedial simplicity. See *id.* at cmt. b.

105. 479 F.2d 638 (4th Cir. 1973).

106. Steven J. Burton, *Principles of Contract Law* 369 (2d ed. 2001); John P. Dawson et al., *Contracts Cases and Comments* 99 (7th ed. 1998); Lon L. Fuller & Melvin Aron Eisenberg, *Basic Contract Law* 349 (7th ed. 2001); Charles L. Knapp et al., *Problems in Contract Law* 1116 (4th ed. 1999).

107. 479 F.2d at 640.

108. *Id.*



damages because it would have lost money on the contract.<sup>109</sup> The court of appeals held that the subcontractor could recover its entire cost in restitution.<sup>110</sup>

The traditional rule has particularly perverse effects if it is coupled with a rule denying restitution to a person who performs a disputed obligation at the demand of the other—i.e., a rule denying restitution in cases like *ABC Electric*.<sup>111</sup> This combination creates a sharp dilemma for a person who disputes his performance obligation under a winning bargain. If he stands on his claim of right refusing to perform the disputed obligation and turns out to be wrong, then he forfeits his profits on the bargain under the traditional rule. If he performs as the other demands, he cannot get back the cost of his excess performance even if he is in the right.

An illustration makes this more vivid. Coal company *S* has a multi-year contract with utility *B* to supply the output of *S*'s coal mine to *B*'s adjacent coal-powered plant. The contract has an ambiguous price adjustment clause. *B* honestly believes the correct price (say \$20 per ton) is far below the current price at the nearest market (say \$40 per ton). *S* honestly believes the correct price is significantly higher than *B*'s estimate (say \$30 per ton) but still below the current market price. The cost of shipping coal to or from the area of the mine and plant to the nearest market is \$5 per ton. *B* is in a tough spot. If *B* tenders \$20 per ton as payment but owes \$30, then *S* may have the option to rescind the contract and get out of what is a losing bargain to it at either price. *B* can pay what he thinks he owes only at the risk of forfeiting his gains on the contract should he be wrong. On the other hand, if *B* pays \$30 per ton under protest and it turns out that \$20 is the correct price, he will be unable to recover the overpayment in restitution.

### B. *When Is Restitution an Appropriate Remedy on Breach?*

The traditional rule would not have survived if it did not work tolerably well in most cases where it is applied. *Boomer v. Muir* is not the only situation where the traditional rule gets it right. It is uncontroversial that restitution is appropriate when it best compensates the plaintiff's loss from breach. Depending on the case,

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109. *Id.*

110. *Id.* Perverse outcomes usually can be avoided under the common law, and *Algernon Blair* is no exception. The trial court might well have held that the general contractor's act of withholding payment was not a total breach justifying rescission. This is a strong argument, for the general withheld payment on the honest belief that it was not due and the delay in payment would not have irreparably harmed the subcontractor. The appellate court is more to blame—though it was not helped by the defendant's counsel, who failed to preserve the issue of material breach—because it reversed the trial court by applying the traditional rule without thinking through the situation.

111. See *supra* notes 23-28, 34, 103 and accompanying text.

restitution can be either restoration of the plaintiff's costs or disgorgement of the defendant's gains from the breach or from the contract.<sup>112</sup> *Boomer v. Muir* could be decided on this basis as well as the rule I propose because the cost overruns were attributable to the defendant's breach. Something like the rule I propose is still necessary to explain why the voluntary payment doctrine does not cut off the claim and to cover cases like *ABC Electric*. Restitution may also have a role to play in requiring disgorgement of gain from certain opportunistic breaches. Others have written piercingly on this question so I will not explore it.<sup>113</sup>

The following hypothetical presents an appealing case for restitution on breach, although it puts the plaintiff in a much better position than would performance because he made a bad bargain.

A employs B to drill an exploratory oil well and pays B in advance. Before B does any work, they unexpectedly learn that there is no oil.

112. An example is the election of restitution to recover the contract price upon total or close to total failure of performance. See, e.g., *Economy Swimming Pool Co. v. Freeling*, 370 S.W.2d 438 (Ark. 1963) (allowing a plaintiff to elect restitution as a remedy where contractor was hired to build a watertight fallout shelter and the shelter was useless because of incurable seepage).

Sometimes the defendant's profit from breach is the best measure of the plaintiff's loss from breach. An example is where the defendant violates a covenant not to compete. What may seem to be a disgorgement remedy, argued for in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995), aff'd, 518 U.S. 839 (1996), and its progeny, may be justified along similar lines. The cases are important because of the huge amounts of money at stake. These cases arose after the United States government reneged on a promise of favorable accounting treatment made to acquirers of failing savings and loans. The plaintiffs sought damages equal to the net liabilities of the S & L's they acquired. See *id.* at 858. A hypothetical shows the logic behind this remedy. A acquires a business from B with assets of \$20 and liabilities of \$30. To induce A to take over the business B guarantees A's credit on the acquired business, and A's other business. B reneges on the guarantee and A fails. The net negative value of the business A acquired—\$10—represents its cost in the transaction and is a presumptive measure of the floor of the expected value of B's guarantee to A. The real issue in the case is whether the book value gets at the real net negative value.

113. Peter Birks, *Introduction to the Law of Restitution* 334-36 (1985) (advocating gains-based damages for "deliberate exploitation" or where purpose of contract was to preclude defendant from engaging in the act from which the gain accrued); Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 *Theoretical Inquiries in Law* 115 (2000); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 *Colum. L. Rev.* 504 (1980); Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 *Tex. L. Rev.* 2021, 2049-50 (2001) (advocating disgorgement of profits "to deter a form of conscious wrongdoing that encounters no adequate disincentive if the defendant's liability is restricted to the plaintiff's loss").

Kull cites the intentional violation of a restrictive covenant as an example of a case where restitution is justified on this ground. *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720 (2d Cir. 1992), is an illustration of this example. Bausch & Lomb recovered a prepaid royalty on a Restitution theory as a remedy for Bressler's violation of an exclusivity provision and other uncured breaches. *Id.* at 730. An interesting feature of the case is that the contract stated the royalty was refundable under "no circumstances." *Id.* Friedmann, *supra*, supplies many other illustrations.

*B* does not drill the well because *B* is certain that drilling is worthless.

The instinctive response is that *B* ought to return the payment. What may drive this instinct is that while restitution puts *A* in a better position than he bargained for, it does this by taking what would be a windfall from *B*.<sup>114</sup> The English have called this the case of “skimped performance.”<sup>115</sup> This is not a trivial matter. It may lay a basis for a restitution claim in *Peevyhouse v. Garland Coal & Mining Co.*,<sup>116</sup> a case familiar to most American law students, if the plaintiffs can establish what they gave up in negotiating the mineral lease in return for the coal company’s unkept promise to restore the land. Restitution of the foregone payment (or the expected cost of drilling) could as well rest on the first ground—that it is the best measure of the Peevyhouse’s loss from the damage to their land.

Finally, a right to restitution on breach may be justified as concomitant to the power to claim discharge on breach. Discharge often leaves the non-defaulting party in a better position than he bargained for at the expense of the defaulting party in a way that undoes the parties’ bargain.<sup>117</sup> A familiar example is the discharge of an insurer from its obligation under a policy because of a minor default by the insured, such as failing to file a claim in a timely fashion. The law strives to avoid forfeiture—particularly in cases like the example—through an interpretive presumption, rules on waiver and impossibility, and, in a handful of states, a doctrine that allows a court to override a condition to avoid disproportionate forfeiture. But the rules that temper the power of discharge apply only in extreme

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114. Restitution in the hypothetical (but not in *Peevyhouse*) may be justified for a different reason. Steve Hedley writes that it is “not . . . particularly controversial” that “[f]or a sufficiently serious breach, the claimant may seek return of what they supplied under the contract, and may succeed in this, so long as it is possible to return it precisely, and that they can return anything the defendant supplied to them.” Steve Hedley, *Restitution: Its Division and Ordering* 48 (2001). Andrew Kull has similar views:

These were cases, briefly, in which the nature of the default suggested a relative indifference to the contractual exchange on the part of the defendant; where the partly performed transaction was easily reversed; and where rescission of the contract was cheaper than enforcement. A simple case, meeting all three criteria, is one in which a buyer pays in advance for goods that a seller does not bother to deliver.

Kull, *supra* note 10, at 1476. The interest in remedial simplicity drives both arguments. Later in the same article, Kull comments that “each of the cases at this level involves circumstances in which the undoing of the bargain is at least as easy as the calculation of contract damages.” *Id.* at 1492-93.

115. *Attorney-General v. Blake*, Ch. 439, 458 (Eng. C.A. 1997), *appeal dismissed*, 1 A.C. 268 (H.L. 2001).

116. 382 P.2d 109 (Okla. 1962). Kull makes this point, *supra* note 113, at 2046-47.

117. Corbin explains that discharge “operates as a penalty, however, since it deprives the one guilty of the ‘breach’ of the benefit of his bargain, the possible profits of performance.” 6 Corbin, *supra* note 62, § 1253, at 10 n.7.

cases. Discharge often distorts contractual payoffs in subtle ways that go unnoticed.<sup>118</sup>

The Restatement (Second) of Contracts equates the right to discharge and the right to restitution on breach by making a finding of "total breach" a trigger to both.<sup>119</sup> This is difficult to justify as a general matter.<sup>120</sup> The interests in remedial simplicity and finality easily explain why it ought to be easier to withhold performance than to get back the value of performance already rendered. But there are good arguments to equate the two responses when the claim is to get back the value of performance that is rendered after default.<sup>121</sup> It is

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118. Consider the case of a wrongfully terminated employee who recovers wages for the remainder of the contract term and is discharged from a covenant not to compete. *See Ward v. American Mut. Liab. Ins. Co.*, 443 N.E.2d 1342, 1344 (Mass. 1983). In theory, the employer ought to be able to subtract from the wages the expected value of the gain to the employee from being freed of the covenant. This adjustment is similar to subtracting the plaintiff's avoided cost of completing a contract from the contract price. The adjustment is not made because the expected value of the gain to the employee from being freed of the covenant is too speculative. This is the same reason why the value of leisure is not subtracted from the wages recovered by a wrongfully terminated employee who cannot find suitable alternative work.

119. The Restatement (Second) of Contracts defines a total breach as an incurable material breach or a default coupled with a repudiation. Restatement (Second) of Contracts § 243. Sections 243(1) and (2) make total breach a trigger for discharge. Section 373 makes it a trigger for restitution.

There is much case law to the contrary, holding that the remedy of restitution is discretionary and requires a special showing. *See, e.g., Bernstein v. Nemeyer*, 570 A.2d 164, 169 (Conn. 1990) ("[A] material breach of the partnership agreement, does not automatically and unconditionally entitle the plaintiffs to recover their investment in the partnership. The award of a restitutionary remedy for breach of contract depends upon a showing of what justice requires in the particular circumstances."); *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 718 P.2d 551, 558-59 (Idaho Ct. App. 1985) (directing that trial court should not calculate restitution damages to put the plaintiff in position better than that promised absent a special showing of factors to justify such a remedy); *Patch v. Arsenault*, 653 A.2d 1079, 1082-83 (N.H. 1995) (rescission and restitution should be granted only "when in all the circumstances it appears right and just to the parties to do so" (quoting *Barber v. Somers*, 150 A.2d 408, 411 (N.H. 1959))) . This is usually explained by rescission's origin in equity. *Barber*, 150 A.2d 408. The factors that are said to guide this discretion—whether the remedy is necessary to put the plaintiff in the promised position, the hardship of the remedy on the defendant, and the difficulty of returning the parties to the status quo—are essentially the same factors that guide the analysis of material breach, which is discretionary in practice though not from equity in origin.

120. Corbin is eloquent on this point. 6 Corbin, *supra* note 62, § 1253, at 13-17 & nn.9-12; *see also Kull*, *supra* note 10, at 1476.

121. This justifies the result in *EarthInfo, Inc. v. Hydrosphere Resource Consultants, Inc.*, 900 P.2d 113 (Colo. 1995). Hydrosphere licensed its Hydrodata product line to EarthInfo. *Id.* at 116. A dispute arose when Hydrosphere demanded royalties on a derivative product marketed by EarthInfo. *Id.* EarthInfo responded to the demand by withholding all royalty payments. *Id.* The court in a two-to-one decision allowed Hydrosphere to recover EarthInfo's profits from the Hydrodata line from the date that EarthInfo withheld royalties. *Id.* at 117.

The opinion is a hopeless muddle. The opinion says several times that the wrongfulness of the defendant's behavior matters. *Id.* at 119. But other factors

well established that a landlord may recover market rent, though it may exceed the rent due under the lease after he declares the tenant in default.<sup>122</sup> A formal argument for this result is that after the landlord declares the tenant in default, the landlord has the right to the possession of the premises. His damages from the infringement of that right are fair market rent. A practical argument for the result is that it encourages the landlord to allow the tenant to remain in possession. It is a carrot to encourage the landlord not to use self-help to evict the tenant or otherwise to interfere with the tenant's possession.<sup>123</sup> The practical argument is similar to the argument for restitution in *Boomer v. Muir*, because sudden removal of a tenant is likely to impose a significant loss.

*C. A General Right to Restitution on Breach Does Not Inhere in the Concept of Unjust Enrichment*

We can go this far, but no further, in justifying a right to restitution on breach of contract on the basis of contract law policies or principles. The relevant policies are those that favor vindicating rights (embodied in the expectation principle) at the least cost (the mitigation principle) and the least fuss (the interest in remedial simplicity). Some argue that this approach to the issue is deeply misguided because a right to restitution on breach is justified by an "autonomous" principle of unjust enrichment that is independent of contract law.<sup>124</sup> The argument goes something like this: Unjust enrichment occurs when one person makes a nonconsensual transfer to another. A transferee's breach of contract, if sufficiently severe, vitiates the transferor's consent to a transfer made under a contract. Therefore, a person who breaches a contract is unjustly enriched if he retains benefits received under the contract.<sup>125</sup> The argument

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mentioned in the same context go to the subsidiary question of whether a defendant should be given credit for his contribution in measuring gains-based damages. On the question of whether gains-based damages were appropriate at all, the opinion merely says that they were imposed "since [EarthInfo's] breach was conscious and substantial." *Id.* at 120. This treats any significant, intentional breach as grounds for disgorgement of profits from breach.

122. Ill. Cent. Gulf R.R. Co. v. Int'l Harvester Co., 405 So. 2d 545 (La. Ct. App. 1981). See generally C.S. Patrinelis, Annotation, *Measure of Damages for Tenant's Failure to Surrender Possession of Rented Premises*, 32 A.L.R.2d 582 (1953).

123. The trend is to restrict the use of self-help by a landlord. *Berg v. Wiley*, 264 N.W.2d 145 (Minn. 1978), is representative of the general trend but goes further by stating an absolute prohibition. Most states permit self-help in principle but not in practice by holding a landlord to a high standard on the use of force with severe sanctions for violating the standard.

124. Skelton, *supra* note 10, at 7; Stephen A. Smith, *Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement*, 115 L.Q. Rev. 245, 249 (1999).

125. Smith is terser: "P gives D money (or benefits in kind) on the condition that D does something. D does not fulfill the condition. P asks, rightly, for the money back. End of story." Smith, *supra* note 124, at 249.

analogizes a broken contract to a conditional gift with an unfulfilled condition.

This is a conceptual argument. The claim is that a right to restitution on breach inheres in the concept of unjust enrichment. A general answer to this sort of argument is that abstract legal concepts, like the concept of unjust enrichment, are not a basis for solving concrete problems.<sup>126</sup> They are like headings in a table of contents or in an index to the law that we use to organize the rules that do the work on the ground level. The criteria for the validity of a rule can be endlessly debated, but the claim that a rule is justified by the general heading under which it is found is fairly weak on its face. Unless the heading expresses or corresponds to some fundamental value (the concept of unjust enrichment does not on its face), the force of the claim derives from the value we place on having rules correspond with the organizing concepts and the value we place on having rules fit together in a coherent and consistent pattern.<sup>127</sup>

I answer the conceptual argument in this spirit by showing that there is a better abstract account of the law of restitution and the principle of unjust enrichment that excludes a general right to restitution on breach of contract. The account that follows is not idiosyncratic (which would be a major strike against it) because it is consistent with the general structure of the Restatement (Third) of Restitution and Unjust Enrichment.<sup>128</sup> I use broad strokes because they suffice to make what is finally a modest point. The exercise has some slight secondary value in situating the rule I propose in Part I within the law of restitution.

It is hotly debated whether unjust enrichment is a useful concept at all.<sup>129</sup> Those who think the concept has its uses tend to agree that it covers only part of the law of restitution. The other parts cover restitution as a remedy for wrongs and what Peter Birks calls policy-based restitution. In the latter category, restitution is used as an incentive or a reward to encourage a person to do an act that benefits

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126. I expect that few American legal academics will be persuaded by this type of argument because a mixture of ignorance and realism makes us fairly insensitive to conceptual arguments in private law. Constitutional law is a different matter.

127. Insisting that rules correspond with organizing concepts is one way to preserve coherency and consistency among rules within the same concept, though at the price of creating anomalies at the borders of the organizing concepts.

128. The argument from the concept of unjust enrichment perverts the usual meaning of the concept in a contractual setting. In this setting, the baseline for measuring whether there are unjust gains and losses is the parties' bargain and not their pre-contractual position. For example, forfeiture is equated with unjust enrichment. *See, e.g.,* Quigley v. Acker, 955 P.2d 1377, 1385 (Mont. 1998). Forfeiture occurs when denying a person the agreed return on a contract gives the other a windfall under the contract.

129. The champion on the side of the principle is Peter Birks. His opus is *Introduction to the Law of Restitution* (1985). Steve Hedley, *Restitution: Its Division and Ordering* (2001), is an engaging statement of an opposing view.

another. The Third Restatement puts these rules under the general heading "Intentional Transfers."<sup>130</sup> A case can be made for either heading. Birks' heading emphasizes the reasons behind the rules within the heading (they are forward-looking reasons of policy); the Third Restatement's heading emphasizes that plaintiffs know what they are doing when they act to benefit another under these rules (otherwise an incentive keyed to the benefit would be of little value). While the rescue cases may come first to mind to many American lawyers in thinking of this heading of obligation (*Cotnam v. Wisdom*<sup>131</sup> is a first-year staple), most of the law under the heading involves what the Third Restatement calls "self-interested intervention."<sup>132</sup> These are cases where a person knowingly benefits another in pursuing his own interest. The rule I propose to reward performance in a contract dispute fits here.

There also is a fair amount of consensus on the case that is at the center of the remaining part of the law of restitution. This is the case of a mistaken transfer. The argument is over the general heading, if any, that best covers this case and over the other cases (if any) that belong under the same general heading. The conceptual argument sketched above places atop this area of law a principle of unjust enrichment aimed at reversing nonconsensual transfer. This schema logically groups breach of contract with mistake. It also assumes, controversially, that the heading is more than just a heading. It is a principle with some normative weight.

A difficulty with this formulation of a general principle of unjust enrichment and this grouping is that most of the law on mistaken transfers is framed around cases in which the defendant is faultless. This is why the law goes to great lengths to ensure that a defendant is made to give up no more than he gained from the plaintiff's mistake. A general principle that is aimed at reversing nonconsensual transfers elides this important feature of the law because consent turns on the plaintiff's state of mind and not on the defendant's degree of fault. Some grounds for vitiating consent involve blameworthy conduct by the defendant, including breach of contract. Indeed, restitution on breach is unlike restitution on mistake because the measure of restitution on breach is the plaintiff's loss and not the defendant's gain, assuming the loss is greater.<sup>133</sup>

The Restatement (Third) of Restitution and Unjust Enrichment eschews a live general principle of unjust enrichment.<sup>134</sup> It places

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130. Restatement (Third) of Restitution and Unjust Enrichment ch. 3 (Tentative Draft No. 2, 2002).

131. 104 S.W. 164 (Ark. 1907).

132. Restatement (Third) of Restitution and Unjust Enrichment ch. 3, topic 2 (Tentative Draft No. 2, 2002).

133. Professor Perillo makes this point. See generally Perillo, *supra* note 5.

134. Section one states the general principle that "[a] person who is unjustly

mistaken transfers in a general category with the purposefully opaque and inert heading "Transfers Subject to Avoidance" alongside a grab bag of concepts that state other grounds for vitiating consent.<sup>135</sup> Notably, these other grounds do not include breach of contract or failure of consideration (the latter is a significant concept in English law).

The Third Restatement accounts for the law's solicitude for the faultless defendant along with the law's hostility to the officious intermeddler by postulating a general principle opposing forced exchange as a counter-principle to the general principle of unjust enrichment.<sup>136</sup> To this end, the Third Restatement establishes the primacy of contract over restitution by stating that restitution is concerned with transactions that "take place outside the framework of an enforceable contract."<sup>137</sup> A principle of primacy of contract follows from a principle opposing forced exchange because contract, being voluntary, is the preferred mechanism for exchange. While this account of the law has its problems,<sup>138</sup> it corresponds with the ground-

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enriched at the expense of another is liable in restitution to the other." Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft, 2000). Section two then undercuts the principle with the statement "[t]he fact that a person has received or obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched." *Id.* § 2(3) (Discussion Draft, 2000).

135. The grounds, other than mistake, for vitiating consent are fraud, duress, undue influence, incapacity, lack of authority, and legal compulsion. Restatement (Third) of Restitution and Unjust Enrichment ch. 3, topics 2 & 3 (Tentative Draft No. 1, 2001). A common denominator is that none of these rules require blameworthy conduct by the defendant. Fraud will be dealt with separately as a wrong. *Id.* § 13 cmt. a.

136. The principle opposing forced exchange appears in the Third Restatement's black letter on mistaken improvements: "A remedy for mistaken improvement that subjects the owner to a forced exchange will be qualified or limited to avoid undue prejudice to the owner." Restatement (Third) of Restitution and Unjust Enrichment § 10 (Tentative Draft No. 1, 2001). Many of the Third Restatement's specific limitations on restitution follow from the principle opposing forced exchange. The general rule on self-interested intervention follows straight from it. The self-interested intervenor will recover only if the benefit he confers is monetary, or he replaces a money obligation of equal or greater amount, or "relief may be allowed to the claimant, by way of specific restitution or otherwise, in a manner that does not require the recipient to pay for a nonmoney benefit the recipient had no opportunity to refuse." *Id.* § 23(d) (Tentative Draft No. 2, 2002).

137. Restatement (Third) of Restitution and Unjust Enrichment § 2(2) (Discussion Draft, 2000). A second principle applies in the case of an intentional transfer and states that there is no liability in Restitution "unless the circumstances of the transaction are such as to excuse the claimant from the necessity of basing a claim to payment on a contract with the recipient." *Id.* § 2(4) (Discussion Draft, 2000). This gives substantive content to the concept of officiousness.

138. One criticism is that it does not adequately distinguish restitution for wrongs and restitution to reverse mistaken transfers. See Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 Tex. L. Rev. 1767 (2001). The fighting issue in the borderland between contract and restitution is the extent to which restitution will rectify unjust enrichment in informal relationships and pre-contractual dealings where the parties could have written a contract to define their rights and obligations, but they understandably did not.



level rules better than does an account organized around a general principle of unjust enrichment that is aimed at reversing nonconsensual transfers. This schema makes the claim that there is an autonomous principle of unjust enrichment in the law of restitution that is a basis for subverting bargains appear deeply wrongheaded.

The Restatement goes a bit overboard in trying to wall off contract from restitution. The statement that restitution is concerned with transactions that “take place outside the framework of an enforceable contract” is reminiscent of the old saw that “no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests.”<sup>139</sup> These statements are vacuous or wrong. The old saw is from an opinion in which the court went on to say that the general principle does not apply “when the express contract does not fully address a subject matter.”<sup>140</sup> The two statements give nearly opposite answers to the question of whether claims that sound in restitution can be used to fill in gaps in contracts. The old saw proscribes gap-filling if the contract “concerns” the subject matter of the claim. The qualifier allows gap-filling unless the contract “fully addresses” the subject matter of the claim.

The truth, not surprisingly, lies somewhere in the middle. The law of restitution is the home of some implied contract terms. Why they ended up there is beside the point. They are there and any account of the law of restitution is going to have to incorporate them. An uncontroversial example is the right of a defaulter to recover the value of his part performance to avoid unjust enrichment. The example is uncontroversial because the concept of unjust enrichment is used to fulfill goals of contract law. It takes a very clear signal in a contract to displace an implied term that usually is in a party’s interest. The right of a defaulter to recover the value of his performance to avoid unjust enrichment is sticky in precisely this way. Indeed, the defaulter’s right to compensation might not give way even to a clear term conditioning the right on non-default, as there are tools to ignore a condition if honoring it would result in disproportionate forfeiture, which, of course, is a species of unjust enrichment.

Another example of the stickiness of some terms implied through the law of restitution arises in the same factual context as *Boomer v. Muir*. The problem arises when a contractor sues in restitution to recover cost overruns due to delay on a project and the defendant invokes a “no damage for delay” clause in the construction contract. The cases exhibit the familiar tension between respect for the parties’ bargain and distrust of contract terms that immunize a party from

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139. *County Comm’rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600 (Md. 2000) (citation and internal quotation marks omitted).

140. *Id.* at 609 n.12 (citing *Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 786 (8th Cir. 1996)).

liability for losses caused by his own negligence or worse. The modern trend is to confront this tension head-on with a multi-factor analysis.<sup>141</sup>

### CONCLUSION

It is time to do away with the general right to restitution on breach of contract. The good done by the general rule can be done by rules that are more closely tailored to the specific situations where restitution is an appropriate remedy on breach. I can think of only four: (1) where restitution is the best measure of the plaintiff's loss from breach; (2) where restitution is appropriate to deter opportunistic breach; (3) where restitution deprives the defendant of a windfall; and (4) where restitution provides the value of performance rendered after discharge. *Boomer v. Muir* should be addressed by a rule that allows a person who performs a disputed obligation to recover the cost if the performance was not due and performance avoids a loss without unduly complicating litigation. This rule gets at the real issue in *Boomer*, which is explaining why the voluntary payment doctrine and the larger interest in finality does not cut off a claim of a right when a person performs a disputed obligation.

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141. See *White Oak Corp. v. Dep't of Transp.*, 585 A.2d 1199, 1203 (Conn. 1991); *Corinno Civetta Constr. Corp. v. City of New York*, 493 N.E.2d 905 (N.Y. 1986) (allowing damages for "(1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) unanticipated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract"). See generally Maurice T. Brunner, Annotation, *Validity and Construction of "No-Damage" Clause with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 (1976).

*United States for Use of Susi Contracting Co. v. Zara Contracting Co.*, 146 F.2d 606 (2d Cir. 1944), is one of the more interesting cases. The subcontractor's costs increased because of unforeseen difficult soil conditions. *Id.* at 607. The general contractor had negligently tested the soil and represented it to be workable. *Id.* at 608. The general contractor's agreement with a subcontractor had a disclaimer and a promise by the subcontractor to make no claims for difficulties resulting from latent conditions. *Id.* The decision allows the subcontractor to recover costs notwithstanding this contract term on the reasoning that the term fell when the subcontractor rescinded the contract and sued in restitution. *Id.* at 609. The result is troubling until one adds the facts that the general contractor had charged and collected for the additional costs under its contract with the government.

## *Notes & Observations*